a considerable extent, if the criterion of domicil is substituted for that of nationality in this class of cases, as well it might be, for the policy of a state in the matter of divorce extends equally to all persons domiciled within the state, irrespective of citizenship. As the number of cases in our courts in which the defendant in a divorce proceeding is domiciled in a foreign country must be relatively few, the inconvenience that may arise from the application of the law of the domicil, inclusive of its rules of the conflict of laws, would appear to be negligible.

E. G. L.

TITLE BY INNOCENT MISTAKEN OCCUPATION

If a man occupies land to a certain boundary, mistakenly thinking that all the land is his when in fact part of it is an extension beyond his true line, and if he so occupies the extension for more than the period prescribed in the statute of limitations, does he gain title thereto by adverse possession? There is some real and much apparent conflict in the answer to this question by American state courts.

Take a case of such occupation arising from pure, unsuspected mistake, unaccompanied by any doubt in the occupier's mind that the boundary to which he occupies is in fact the true boundary.[1] It is evident that in such circumstances the intention and claim of the possessor to the strip of land beyond the true boundary are precisely those with respect to all the rest of the land, which is truly his. This conclusion as to the nature of his intent and claim follows from the fact that he is holding to the boundary as the result of unsuspected mistake. For how can it be said that one who is occupying land under the impression that it is his own occupies it with a frame of mind different from that of an owner? If an owner's possession of his own land is hostile to all the world, in the sense that it is unaccompanied by any recognition of right in others,[2] it surely follows that the possession of a man who

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divorce in France, Germany, and Italy, see Lorenzen, *Cases on the Conflict of Laws* (1909) 564, 565.

[1] *Hopkins v. Duggar* (1920) 204 Ala. 626, 87 So. 103.

[2] In Tiffany, *Real Property* (1920 ed.) the author identifies hostility of possession with claim of title. He says at p. 1936: "It has been asserted, by perhaps most of the courts in this country, that, in order that the statute of limitations may run in favor of one in possession of land, the possession must be under claim of right or title. There would seem reason to doubt, however, whether in asserting this requirement, the courts ordinarily have in mind anything more than a restatement of the requirement of hostility of possession." As to what constitutes hostility, the same author says, at p. 1931, that a possession is hostile to a true owner, "when it is unaccompanied by any recognition, expressed or inferable from circumstances, of the right in the latter. It does not involve the necessity of an express denial of the title of the true owner, and, it is evident, in the majority of cases there is no such denial."

thinks he is owner is in fact also hostile, to the same degree and for the same reasons, as in the case of a true title holder. The rightful owner of land can subjectively do no more than think of himself as such and intend to claim and occupy as such; and the innocent mistaken occupier, by virtue of his mistake, has just the same frame of mind. In such a case it would seem fitting to say that the latter occupier's claim was hostile to the rest of the world, including the rightful owner, in such a way as to make his possession adverse.[3]

It may be objected that there is no intention on the part of the occupier to make a claim hostile *to the rightful owner*. This is true in the sense that there is no such intention with respect to a *known or suspected* rightful owner,—the mere fact that the occupation is by pure mistake precluding any possibility of there being a possession hostile to such a consciously considered individual. But there is a conscious claim hostile to the whole world including the rightful owner,—in his capacity as a member of the general community. Should the sole fact that the true owner is unrecognized as such and his existence unsuspected be reason for saying that the occupation is not hostile to him? The better answer seems to be that the possession is hostile to the true owner,[4] in quite the same sense that it is hostile to all others,—no more, no less. It follows that an oral claim—as distinct from an assertion by acts—of exclusive dominion over the strip beyond the true boundary should not be essential to establish a hostile possession[5]; one does not expect such an oral claim from a rightful owner of land; neither should it be expected from one who by mistake holds land with precisely the same frame of mind as that of a rightful owner.

Nevertheless some courts answer the question by saying that the possession is not sufficiently hostile to the true owner to make the possession adverse.[6] In the recent case of *Kinne v. Waggoner* (1921,

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[3] *Moir v. Bailey* (1920) 146 Ark. 347, 225 S. W. 618; *Hopkins v. Duggar, supra* note 1; *Carpenter v. Rose* (1920) 186 Ky. 686, 217 S. W. 1009; *Anderson v. Richards* (1921, Or.) 198 Pac. 570. The last case specifically lays down the rule for cases of mistake; though it does not certainly appear upon the facts as reported that there was necessarily a mistake in the case at bar. The rule may be only dictum here, though it is unquestionably the rule of the state. *French v. Pearce* (1831) 8 Conn. 439, is a leading case in support of this view.

[4] *Alverson v. Hooper* (1919) 108 Wash. 510, 185 Pac. 808; *Heinrichs v. Polking* (1919) 185 Ky. 433, 215 S. W. 179. In this case evidence of agreement might perhaps have been found; but, as it stands on the language of the court, it is a square decision upon the point under inquiry. *Pfeifer v. Scottsbluff Mortgage Loan Co.* (1921, Neb.) 181 N. W. 533. See also *Blackburn v. Coffee* (1920) 142 Ark. 426, 218 S. W. 836. In this case there may have been doubt in the parties' minds as to the line; and consequently not a pure mistake of boundary.

[5] *Cassidy v. Lenahan* (1920) 294 Ill. 503, 128 N. E. 544.

[6] *Kinne v. Waggoner* (1921, Kan.) 197 Pac. 195. There is a good collection of cases on this point—and others—in the note to *Edwards v. Fleming* (1911) 83 Kan. 653, 112 Pac. 836, in 33 L. R. A. (N. S.) 923 *et seq.*; cf. *Long v. Myers*

Kan.) 197 Pac. 195, the defendants had for more than forty years notoriously occupied to a fence which both they and the plaintiffs had mistakenly believed to coincide with the true boundary. The court held that since the original location of the fence was by mistake, there was no basis for adverse possession, saying that the intention to claim and hold adversely was wanting.[7] But might it not be better to say that although it was wanting against a consciously recognized owner, it was present against that owner as an unknown, unisolated member of the general community?

It would seem reasonable in cases of mistaken boundary, as in other cases of possession of real property induced by mistake, to give more weight to the actual possession by the occupier than to the mistake that was its cause. No one would maintain that because one occupied land under a deed which was mistakenly believed to be valid, the occupation was therefore not hostile to the rightful owner.[8] There is only a superficial distinction between such a case and that of occupation under a mistake as to the boundary. In both cases the occupation is innocent; in both the occupier has acted upon an unsuspected error of fact; in

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(1921, Kan.) 198 Pac. 934. *Bradstreet v. Winter* (1920) 119 Me. 30, 109 Atl. 482 looks like a decision on the point under inquiry, though it may have been decided on the ground that possession for the entire statutory period was not sufficiently notorious. *Phelps v. Brevoort* (1919) 207 Mich. 429, 174 N. W. 281 is an interesting case. The defendant's grantor in 1897 sold part of his tract of land, lot 1, retaining the remainder, lot 2. This sale was made to the plaintiff's predecessors in title. In 1898 one H, holding lot 2 under the defendant's grantor, built a fence several feet over upon plaintiff's lot 1, being in error as to the true line. In 1900 defendant's grantor leased lot 2 to S, describing it and lot 1 correctly, as to their true bounds. The fence then existed, however, and all parties, from 1898 on, looked upon its location as the true line. It was held that since the defendant's grantor in occupying the strip did not do so under any specific, definite agreement with the neighboring owners. and *since there was never doubt or controversy as to the true line,* but merely mistake, the defendant, who had been benefited by the erroneous location of the dividing line—and here all parties were in pure error—might not profit permanently by the mistake, and had no title by adverse possession. It will be observed that the court made no point, as did the trial court, of the fact that the defendant's predecessor was the grantor of the land that he subsequently occupied adversely. This case, both on the facts and decision, is squarely opposed to *Moir v. Bailey, supra* note 3, where the adverse occupier was a grantor by deed of the land he continued to occupy.

[7] The court points out that the defendants might have gained title had they and the plaintiffs agreed, *regardless* of the true boundary line, to treat the fence as the boundary. But where both parties were *mistaken* as to the true line, rather than *regardless* of it, both believing the fence to coincide with it, title by adverse possession was not acquired.

[8] 2 Tiffany, *op. cit.* 1949; "In no case except in that of a mistake as to boundary has the element of mistake been regarded as of any significance, and there is no reason for attributing greater weight thereto when the mistake is as to the proper location of a boundary than when it is a mistake as to the title to all the land wrongfully possessed."

both there is the same notice of disseisin. Further, it is generally admitted that the statutes of limitation perfect a defective title in one who with knowledge, or at least with suspicion, of his own wrong has occupied another's land to a definite boundary for more than the statutory period.[9] It is then just that such statutes should be considered equally to perfect the defective title in one who innocently occupies another's land. In either case there is the same hostility to the world at large. Why should the innocent occupant of another's land be regarded with less favor than a conscious wrongdoer?

DAMAGES IN FOREIGN CURRENCY

In times of depreciated and fluctuating currencies the determination of the date governing the rate of exchange becomes important whenever damages are assessed in a foreign currency. In any case where one or more of the operative facts occurred without the territorial limits of the forum, many questions may arise as to the legal consequences to be attached to those facts by the law of the forum.[1] But assuming that damages have been properly assessed, what is the date upon which the rate of exchange shall be taken for the purpose of computing the damages in the currency of the forum.[2] A classification of the cases with reference to their operative facts may aid in the solution of this rather novel and perplexing problem.

The question arose from a tort action in the recent case of *Owners of S. S. Celia v. Owners of S. S. Volturno* (1921, H. L.) 37 T. L. R. 969. Due to the defendant's negligence, a collision occurred in which the plaintiff's ship was damaged. The collision occurred on December 17, 1917; the ship was detained for temporary repairs at Gibraltar from December 25, to December 30, 1917, and for permanent repairs at Newport News from January 24 to February 18, 1918. A part of the plaintiff's loss was due to the fact that the vessel was at all of these dates under hire to the Italian Ministry of Marine, and the plaintiffs received no pay therefor during the periods of detention for repairs. The damages were assessed in Italian lire and, for the purpose of entering judgment in English currency, it was held that they should be converted at

[9] *Ibid.* 1940. Tiffany, in discussing the question of necessity of claim of title so that the statute may run, refers to ". . . . the general acceptance of the view that, in the absence of an express statutory requirement to that effect, the statute will run regardless of whether the wrongful possession was taken under a *bona fide* claim of right." An interesting case in point is *Virginia Midland Ry. v. Barbour* (1899) 97 Va. 118, 33 S. E. 554.

[1] On theory the forum has the power to attach any legal consequences it sees fit. See Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 268-280.

[2] "The court has only jurisdiction to award damages in English money" *Di Ferdinando v. Simon, Smits & Co.* [1920, C. A.] 3 K. B. 409, 412; see *Marburg v. Marburg* (1866) 26 Md. 8, 21.